SUPREME COURT OF THE UNITED STATES

BILL HONIG, SUPERINTENDENT OF PUBLIC INSTRUCTION OF CALIFORNIA, ET AL. *v.* STUDENTS OF THE CALIFORNIA SCHOOL FOR THE BLIND ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-436. Decided April 1, 1985

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

Although I agree with the majority that a case such as this could be moot if the full burden imposed by the preliminary injunction has passed, it is not at all clear that that is the situation here. If this case is moot, the facts making it moot occurred subsequent to the Court of Appeals decision, and so do not appear on the record. That makes this case quite distinct from *University of Texas* v. *Camenisch*, 451 U. S. 390 (1981), where the issue of mootness had been raised, argued, and decided by the Court of Appeals. In the instant case, this Court has received no papers from the parties on this issue other than a petition for certiorari and a response. In those papers, neither party has assured the Court that the factual premises of mootness have actually been fulfilled, nor have the parties agreed that the case is moot. Since the Court has not requested any supplemental information or argument from the parties, the Court is determining that the case is moot without a clear understanding of the facts of the case or their precise legal implications for the parties. I cannot accept that the Court can simply assume, as a factual matter, that mootness exists. We should inform the parties of our suspicion as to mootness and allow briefing on the issue. Absent this procedure, I dissent.

Mootness is mentioned twice in the papers before the Court. First, petitioners argue in their petition for certio-

rari that the case is not moot in spite of the fact that "by the time this Court considers the instant petition, the state officials may well have already complied with the injunction . . . ." Pet. for Cert. 17. Leaving aside the merits of their arguments that full compliance would not render the action moot, their statement is hardly sufficient to inform the Court that there has been full compliance.

This theme is repeated in the respondents' opposition. Respondents assert that the tests ordered by the District Court have been completed "and the final report *in all likelihood* will be completed before this Court determines whether to grant the present petition." Brief in Opposition 14 (emphasis added). The opposition goes on to assure the Court that "should the final report of the trial court's experts indicate, and the trial court find, that the Fremont site is seismically safe, there will remain *no live issue whatsoever* between the parties as to *any* aspect of the case." *Id.*, at 15 (emphasis in original). Although respondents have vigorously argued that once certain events occur this case will become moot, they have stopped conspicuously short of assuring the Court that those events have occurred. Indeed, they do not argue that the case is moot, but instead argue that the case "will become moot before [the] Court can hear or determine the issues presented." *Id.*, at 10.

In support of the opposition, respondents have attached to their filing a letter written by a consulting geologist who presumably is doing work that the preliminary injunction requires petitioner to have done. The letter, like the pleadings stops short of informing this Court of the completion of all work done pursuant to the District Court's preliminary injunction. Dated November 27, 1984, the letter states that additional review of aerial photographs will be completed in "the next 45 days," that a draft report by investigators "should be completed in December" to be followed by a final report "by mid-January," and that the consulting geologists'

report "should be submitted about 60 days later." App. to Brief in Opposition 1–2.

The last filing in this case was the opposition, filed on December 7, 1984, and that, as I discussed above, went no further than to predict events in the following months that would render the case moot in respondents' view. If the situation is still as it was there described, the case may well not yet be moot. Although it is well understood that it is "the duty of counsel to call such facts [as would suggest mootness] to [this Court's] attention," R. Stern & E. Gressman, Supreme Court Practice 896 (5th ed. 1978), nothing has been received since.

Although the Court may believe that the end is so near that it can safely be assumed, the future may well hold surprises for the parties as well as for the Court. A clear understanding of the facts of a case and of their legal implications should be a prerequisite to disposing of a case as moot. This case is a complex one and prior to disposition on mootness the parties should be informed of the Court's suspicion as to mootness and be asked to provide the Court with facts and arguments. Because this was not done, I dissent.